

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In re: ) MDL No. 05-1726  
 ) (JMR/AJB)  
 )  
MEDTRONIC, INC., )  
IMPLANTABLE DEFIBRILLATORS )  
PRODUCTS LIABILITY LITIGATION )  
 ) Courtroom 15  
 ) Wed., October 18, 2006  
 ) Minneapolis, Minnesota  
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S T A T U S C O N F E R E N C E

BEFORE THE HONORABLE ARTHUR J. BOYLAN  
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S :

For Plaintiffs: GUSTAFSON GLUEK, PLLC  
By: Daniel E. Gustafson, Esquire  
650 Northstar East  
608 Second Avenue South  
Minneapolis, Minnesota 55402

Also present: Various plaintiffs' counsel

For Defendant: GREENBERG TRAURIG, LLP  
By: Lori G. Cohen, Esquire  
Jay B. Bryan, Esquire  
The Forum  
3290 Northside Parkway - Suite 400  
Atlanta, Georgia 30327

Also present: Various defendant's counsel

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1 (9:00 a.m.)

2 P R O C E E D I N G S

3 IN OPEN COURT

4 THE COURT: Good morning. This is the matter of  
5 Medtronic, Inc. MDL. The file number is 05-1726.

6 Why don't we have counsel, at least those who have  
7 approached the podium, identify themselves.

8 MR. GUSTAFSON: Dan Gustafson, your Honor -- good  
9 morning -- on behalf of the plaintiffs.

10 MS. COHEN: Lori Cohen on behalf of Medtronic.

11 THE COURT: Welcome to both of you. I had the  
12 parties in anticipation of today's proceeding forward an  
13 agenda, and perhaps we can take up the first matter, which is  
14 the preservation order issues.

15 Ms. Cohen or Mr. Gustafson?

16 MS. COHEN: Yes, your Honor. As we discussed in  
17 chambers -- and I think your Honor has told us that we should  
18 not completely reargue at this time, but on the preservation  
19 order issues outlined in the agenda for today's status  
20 conference, I would say that subsections (a), (d), and (e)  
21 can be lumped together. And these really are Plaintiffs'  
22 requests that are outlined in our respective letters as well,  
23 and these can be I think fairly described as Plaintiffs'  
24 requests that they receive notice on behalf of Plaintiffs as  
25 part of the PSC and also be allowed to participate in any

1 testing activities, both themselves and experts, and that  
2 they be allowed to basically demand destructive testing, and  
3 I think that covers (a), (d), and (e).

4 And as we discussed in chambers and have set forth  
5 in our letter, we think that the preservation order that has  
6 been in effect since January 23rd of '06 and signed and  
7 executed by your Honor is working just fine. Medtronic has  
8 been complying with that preservation order, has been doing  
9 the appropriate notification steps before doing any testing,  
10 whether it be nondestructive or destructive, and I think the  
11 heart of what we really discussed in chambers is whether  
12 there's some obligation on behalf of Medtronic to notify the  
13 PSC in addition to the notification provisions in the  
14 preservation order and the way that it's been handled thus  
15 far. And we have explained to your Honor that to do so would  
16 not only be burdensome, would be contrary to the preservation  
17 order requirements, but in addition, it would impose and  
18 invade confidentiality, HIPAA issues, and patient privacy  
19 issues for people who do not have cases in the MDL and  
20 patients and plaintiffs who are not affiliated with the PSC.

21 THE COURT: Mr. Gustafson?

22 MR. GUSTAFSON: Your Honor, I think Ms. Cohen has  
23 lumped those three properly. I would say, as we did in  
24 chambers, that there's really several issues that relate to  
25 this.

1           First of all, we're not suggesting that they're  
2           violating a protective order. What we're -- or the  
3           preservation order. What we're suggesting is that the  
4           preservation order has created an unfair playing field with  
5           respect to the protection -- or the preservation of evidence.  
6           They are not required to do any testing. We are not able to  
7           request testing. We are not notified of testing except in a  
8           circumstance in which one of the MDL lawyers is -- happens to  
9           be the device that they choose to test.

10           If you think about it in the abstract, they could  
11           select to test all devices that don't have lawyers, as an  
12           example, and be in full compliance with the protective order,  
13           thereby precluding us from even knowing that destructive  
14           testing was occurring, let alone participating in it.

15           With respect to participation, we don't see any  
16           reason why we shouldn't be able to participate in the  
17           testing. It's mostly observation in terms of that and I  
18           think we could work out the observation issues if your Honor  
19           decides that the MDL counsel should participate.

20           But the fact is that this is evidence -- regardless  
21           of whether these people are in the MDL, outside the MDL, have  
22           counsel, don't have counsel or any of those situations, this  
23           is evidence relevant to this case. And so since this Court  
24           has appointed the co-lead counsel and the PSC to oversee this  
25           case and litigate this case on behalf of absent class

1 members, we ought to be involved in that process, and to be  
2 excluded from that process is not only a nonlevel playing  
3 field, but it presents the opportunity for the loss of  
4 relevant evidence. So I won't say any more on that. We  
5 talked about it more in chambers.

6 With respect to --

7 MS. COHEN: May I respond to that just before we  
8 go to the next one?

9 THE COURT: Sure.

10 MR. GUSTAFSON: I'm sorry. I apologize.

11 MS. COHEN: That's okay.

12 The only additional thing I would add to that is,  
13 as we discussed in chambers, I mean, no evidence is being  
14 lost. All the evidence is being properly preserved and  
15 retained, whether it be the save-to-disks in the  
16 interrogations or the devices themselves. Everything is  
17 being absolutely preserved pursuant to the law and the  
18 preservation order. Not only is Medtronic following the  
19 preservation order and has been since its inception, but also  
20 following all of the federal regulations, which is why --  
21 although Mr. Gustafson talks about an unlevel playing field,  
22 it's that we have federal obligations that we must meet and  
23 we must -- and that's what prompted the initial preservation  
24 order. But in addition, we're following all the protocols  
25 that we have that have been produced to the PSC and we're

1 sending out the appropriate notices, and we've sent out, as I  
2 said in chambers, hundreds and nobody has shown up.

3 The only other additional point that I made in  
4 chambers that I'd like to say now is that to go from  
5 functional testing through destructive testing, as I said,  
6 can take up to three days, and it's incredibly cumbersome and  
7 burdensome and expensive, and I guess the PSC is suggesting  
8 that they would come and attend all of these. It would slow  
9 down the process and it would impede Medtronic's ability to  
10 get the testing done properly and timely to meet the federal  
11 obligations.

12 THE COURT: I would presume on that last matter  
13 that if indeed it took three days to undertake this entire  
14 protocol of testing, that because you've notified Plaintiffs  
15 concerning the details of such protocol, they could choose to  
16 be there for a certain part of that or not part of that if  
17 the Court were to allow that. I mean, that would be fair,  
18 wouldn't it?

19 MS. COHEN: I think that's right, that they could  
20 come in at certain parts, but again, that creates a  
21 notification problem, and also, you know, it's very  
22 disruptive. I mean, if all of a sudden you have people  
23 coming in midstream while testing is going on -- I mean, as  
24 you can imagine, we have employees there who are trying to do  
25 their job in addition to this testing going on. So we're

1       trying to meet the obligations and I think that the  
2       preservation order as it exists now has been working fine.

3               THE COURT:     Can I ask whether or not you have some  
4       other protocols that Medtronic is following or other  
5       preservation orders that you're subject to vis-a-vis cases  
6       that are in courts but that are not part of the MDL, some  
7       state court cases here in Minnesota or elsewhere where there  
8       is a preservation order or a protocol that's different from  
9       that which we have presently in court?

10              MS. COHEN:     There are none.

11              THE COURT:     Okay.

12              MS. COHEN:     I mean, this is the one.  For example,  
13       the Minnesota state court cases are following this MDL, and  
14       then the other state court cases, they're so few, there are  
15       not any existing ones.

16              THE COURT:     Okay.

17              MR. GUSTAFSON:  One just real quick comment,  
18       Judge.

19              Ms. Cohen's comments highlight the problem.  We're  
20       not present, they're not videotaping, they're selectively  
21       photographing.  It can't be undone.  If -- you know, perhaps  
22       if they worked out a videotaping protocol that would satisfy  
23       the experts, that would be one thing that wouldn't require  
24       our presence, but -- and this whole three-day process, we  
25       don't have to be present for the whole three-day process.  It

1 involves sterilization, other things that you don't have to  
2 be present for. But that opportunity to observe the  
3 destructive testing is being lost.

4 THE COURT: Okay.

5 MR. GUSTAFSON: It's not being -- she is  
6 preserving it according to the preservation order, but  
7 there's no visual preservation.

8 THE COURT: Let me just follow up on that. What  
9 about videotaping any of these destructive tests? Is there a  
10 particular problem in Medtronic's view if the Court, in lieu  
11 of having the PSC or their experts or representatives attend  
12 testing, that some videotape be taken of the testing in  
13 question or a portion of the testing in question?

14 MS. COHEN: I think that we would be opposed to  
15 videotaping. And this has come up with respect to those  
16 California cases that I know are not on the agenda right now,  
17 but I think we're very apprehensive about any videotaping.  
18 Even though there is a protective order in place that would  
19 govern that, having a videotape out there that hones in on  
20 and looks at the inside of devices, you know, it's as  
21 proprietary and confidential as you can get and there's a lot  
22 of competition, as the Court knows, in this area, medical  
23 devices. Having a videotape of the inside of Medtronic of  
24 the testing, of the facility itself where the testing is done  
25 and other individuals are working and of the devices while



1       they're being taken apart we think would be very dangerous.

2               THE COURT:     Although I would suspect if I were  
3       Medtronic -- and maybe I'm paranoid, but I don't think I'm  
4       too paranoid.  You're not really paranoid if they're really  
5       after you, I suppose.  If you have a device that's out there,  
6       don't I expect that my competitors will have that device and  
7       have an opportunity to take it apart sometime and re-engineer  
8       it and reverse-engineer it?  Taking a look inside the device  
9       during a videotaping is not going to be anything more than  
10      probably what the competitors across the street have been  
11      doing for years.

12             MR. GUSTAFSON:   Well, the other thing, Judge, is,  
13      these devices are patented.  There's sketches and photographs  
14      and all sorts of things in the Patent Office that are public  
15      records.  You know, these are not devices that you can't  
16      purchase.

17             MS. COHEN:     Mr. Bryan makes a point that if we  
18      were to videotape the testing but did not disseminate the  
19      videotape and instead had a showing of it, in other words,  
20      where the PSC could come with their expert and watch it, that  
21      might be one way to handle it, but not to allow the videotape  
22      to be disseminated and mailed and sent out to people.

23             THE COURT:     Sure.  Okay.  Anything else under  
24      preservation order issues?  We touched on (a), (d), and (e).  
25      (B) and (c)?  Anything either of you wish to make the Court

1       aware of? I know that under (c), I at least understood there  
2       was going to be a meet-and-confer concerning that particular  
3       topic.

4               MS. COHEN: I think based on your comments in  
5       chambers, I think we'll be able to work out (b) and (c).

6               THE COURT: Okay. Sounds great.

7               MR. GUSTAFSON: We will meet and confer and let  
8       your Honor know.

9               THE COURT: Number 2 is a confidentiality  
10      designation of depositions.

11              MR. GUSTAFSON: We're meeting and conferring on  
12      that as well, your Honor.

13              THE COURT: And number 3 is the status of  
14      dispositive motions that are pending before the Court but  
15      have not yet been heard or fully briefed.

16              In reference to the motion to strike or sever  
17      certain claims, that has been referred to me by Judge  
18      Rosenbaum. I will ask that the attorneys meet and confer in  
19      reference to when the response brief will be served by the  
20      plaintiffs and when the reply brief would be due, and I  
21      presume that that will be at least if not fully briefed by  
22      the time we see each other in November will be close to being  
23      done by that time.

24              MR. GUSTAFSON: I think we can get it fully  
25      briefed.

1 MS. COHEN: We will, your Honor.

2 THE COURT: All right.

3 And then finally, the proposal for bellwether  
4 protocol and ADR. I know that we've discussed this matter  
5 before and I have advised counsel that it's my intention that  
6 once Judge Rosenbaum's order on the preemption issues is  
7 filed, that I would very likely be taking some opportunity to  
8 sit down and visit with him concerning any thoughts he has  
9 for ADR and any role that he wants the magistrate judge --  
10 because under our local rules we constitute the panel of  
11 neutrals -- whether or not he wishes me to be part of any  
12 such efforts.

13 Anything either of you wanted to add to that?

14 MR. GUSTAFSON: No, your Honor.

15 MS. COHEN: No, your Honor.

16 THE COURT: Okay. Very good. Is there anything  
17 further from either of you? I know that we spent a good hour  
18 or more in chambers before coming in today, so I appreciate  
19 your brevity, because we had plenty of opportunity to talk  
20 about it earlier.

21 Mr. Zimmerman?

22 MR. ZIMMERMAN: Yeah. Just the next status  
23 conference, the announcement.

24 THE COURT: The next status conference I have at  
25 9 o'clock a.m. here in the courtroom, but I would like to see

1 counsel in chambers at 8 o'clock a.m., the lead counsel for  
2 defense and appropriate counsel for Plaintiffs.

3 MR. GUSTAFSON: Here in Minneapolis again?

4 THE COURT: I believe so. I'll let you know if  
5 that changes. Otherwise, I'll see you here on the 15th floor  
6 again at 8 o'clock a.m. on Thursday, November 16.

7 MR. GUSTAFSON: Thank you, your Honor.

8 MS. COHEN: Thank you, your Honor.

9 THE COURT: Okay. Thank you. We're in recess.

10 (Proceedings concluded at 9:17 a.m.)

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## C E R T I F I C A T E

I, TIMOTHY J. WILLETTE, Official Court Reporter  
for the United States District Court, do hereby  
certify that the foregoing pages are a true and  
accurate transcription of my shorthand notes,  
taken in the aforementioned matter, to the best  
of my skill and ability.

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